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CRIMINALIZATION OF SAME-SEX RELATIONS IN CAMEROON: APPRAISAL FROM GROUP RIGHTS PERSPECTIVE

*Mikano Emmanuel Kiye**

Abstract

Cameroon's anti-homosexual law has put the country on the spotlight for wrong reasons. The country has been criticized by human rights groups for its treatment of sexual minorities. Mostly based on a liberal paradigm that emphasizes individual claims, the criticisms argue that the anti-homosexuality law is inconsistent with the enjoyment of some rights and freedoms, notably equality, non-discrimination and freedom of expression. By analyzing the relevant domestic and international laws and reviewing selected literatures, this article opines that the conventional position which frowns at the anti-homosexuality law is undermined in Cameroon where criminalization of homosexuality also enforces moral and cultural values. Consequently, within the context of the Constitution of Cameroon, as read alongside international laws, the offence involves competing categories of rights. Though it is inconsistent with some individual rights, it conversely protects group rights which inevitably leads to rights prioritization in the country. This article argues that resistance against decriminalization of same-sex relations is informed by the desire to protect the family, health and moral of society and to reinforce duties owed by individuals to society. To mitigate the tension between individual and group rights inherent in Cameroon's anti-homosexuality law, this article recommends a limited moratorium on prosecutions of homosexuals provided that they are discreet about their sexual orientation. Any attempt at decriminalizing homosexuality without ushering changes in the country's communitarian values will rarely protect homosexuals from persecution and harassment.

Keywords: *Communitarian, Constitution, Criminalization, Homosexuality, Human Rights*

I. INTRODUCTION

Homosexuality involves sexual relations between persons of the same sex. Like in most countries of sub-Saharan Africa, homosexuality is punishable under Cameroonian law.¹ Within the context of both the 1996 Cameroon's Constitution (hereinafter, the Constitution) and international laws, the offence is seemingly at crossroads of competing, and perhaps conflicting,

* Department of English Law, Faculty of Laws and Political Science, University of Buea, Cameroon. The author can be reached through mikano.kiye@ubuea.cm or mikano2@hotmail.com.

¹ See Section 347 *bis* of the Penal Code 1967 of Cameroon, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/cm/cm014en.pdf>.

categories of rights. On one hand, the anti-homosexuality law violates the right to equality, non-discrimination and freedom of expression. On the other hand, however, it potentially protects the country's moral and cultural values. These competing claims have led to a regime of rights prioritization in Cameroon.

The practices that embody the offence of homosexuality in Cameroon are punishable under section 347 *bis* of the penal code 1967 that punishes same-sex relations.² As depicted in the relevant part below, the provision is broadly interpreted by the courts as criminalizing 'homosexuality' in general. Compared with other offences of a sexual flavor, including adultery and rape, the rate of prosecutions for homosexuality is much higher that suggests high level of intolerance against the acts.³

The anti-homosexuality law has been criticized for being contrary to the equality and non-discriminatory provisions of the Constitution.⁴ Moreover, it is said to be inconsistent with the country's international human rights obligations since it contravenes the rights to privacy, personal autonomy and freedom of expression.⁵ According to the Constitution, human rights are fundamental norms that rank higher than, override and prevail over any municipal law in conflict with them.⁶ Since, conceptually, there is no hierarchy in human rights, these rights are liable to conflict with one another such that enforcing one right may result in the violation of another. Unsurprisingly, due to the plethora of rights recognized in Cameroon, its anti-homosexuality law deals with competing rights creating a scenario leading to rights prioritization whereby some rights are elevated above others. Although the anti-homosexuality law infringes on the rights of LGBT⁷ citizens, it has, deliberately or inadvertently, led to the protection of the moral and

² In Cameroon, people have been arrested and others charged under section 347 *bis* of the penal code for indulging in the following practices: touching and fondling someone of the same sex in an erotic manner, dressing in the outfit of opposite sex, erotic kissing of members of the same sex, seducing, sending affectionate text messages to someone of the same sex, drinking feminine drinks like baileys, and anal intercourse. Thus, although the law relates specifically to sexual conduct, it is usually applied in a broad context to prosecute individuals on the basis of their appearance, their mannerisms, style of speech or general conduct.

³ Records suggest that the offence of adultery, punishable under section 361 of the penal code, is of frequent occurrence than that of homosexuality. Nonetheless, in terms of prosecutions, there have been fewer prosecutions for adultery in the courts compared to homosexuality. Indeed, despite its frequency in society, the anti-adultery law is almost a dead letter unlike the provision of section 347 *bis* which is aggressively enforced by the courts. In the case of rape, punishable under section 296 of the penal code, the National Network of Associations of Aunties, a coalition of groups working to combat rape in Cameroon estimates that over 500,000 rapes occur every year. See Irene Zeh Fon, Global Press Journal, Underreporting, Burden of Proof foils Justice for People Who Have Been Raped in Cameroon, available at <https://globalpressjournal.com/africa/cameroon/underreporting-burden-of-proof-foils-justice-for-rape-victims-in-cameroon/> (Accessed on 4th of May, 2019). But many are never documented nor prosecuted because of underreporting and the stigma associated with the offense.

⁴ Atoh Walter Tchemi, *The Non-Repeal of Section 347 (bis) of the Cameroon Penal Code on Cameroon's vis-à-vis International Treaty Commitments Pertaining to LGBT Rights*, 6(2) INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS 77, 80 (2016).

⁵ *Id.*

⁶ Article 45 of the 1996 Constitution, available at [https://ihl-databases.icrc.org/ihl-nat/0/7e3ee07f489d674dc1256ae9002e3915/\\$FILE/Constitution%20Cameroon%20-%20EN.pdf](https://ihl-databases.icrc.org/ihl-nat/0/7e3ee07f489d674dc1256ae9002e3915/$FILE/Constitution%20Cameroon%20-%20EN.pdf).

⁷ It is believed Cameroon has LGBT citizens. Indeed, there are several associations in the country fighting for the protection of the human rights of these citizens. Amongst them is Humanity First Cameroon, which is an association that fights against HIV/AIDS, and defends and protects the human rights of vulnerable people including

cultural claims of the community. By outlawing homosexuality, Cameroon has prioritized cultural claims over, albeit, the legitimate individual rights of LGBT.⁸ Criminalizing homosexuality does not resonate with western thinking and challenges the conventional understanding of rights which attributes rights to individuals rather than to groups.

This article does not reject the conventional understanding of human rights. Neither should it be read as an attack on homosexuality. Contrarily, it recognizes the need to respect the rights of LGBT but provides an alternative position that is consistent with local realities. In addition, the article does not aim to project cultural relativism of human rights although the arguments incidentally raised the saliency of the debate. This article rather documents the criminalization of same-sex relations in Cameroon and unravels the tension it fosters in the domain of human rights. Inasmuch as it recognizes the negative impact of criminalization to the individual rights of LGBT, it advances and explores an alternative argument: criminalization of same-sex relations enforces cultural and group rights.

To meet its aim, the article resorts to conducting an extensive review of selected literatures and in-depth interpretation of the relevant domestic and international laws and legal doctrines. The sources of the data used to arrive at the conclusions are, therefore, basically derived from municipal statutes and international laws.

The rest of the article is organized under four sections. Section two discusses the offence of homosexuality in Cameroon and examines the impact on LGBT. Section three explores the plethora of divergent, and related, rights recognized by the Constitution and under international law. Section four establishes a relationship between the anti-homosexuality law and the protection of cultural and group rights. It argues that upholding group rights may justify the rejection of homosexuality. Finally, section five concludes and provides recommendations.

II. THE CRIME OF HOMOSEXUALITY UNDER CAMEROONIAN LAW

Homosexuality in Cameroon is punishable under section 347 *bis* of the penal code. According to the provision, “whoever has sexual relations with a person of the same sex shall be punished with imprisonment for from six months to five years and a fine of from CFAF 20000 to CFAF 200000.”⁹ It also states that the penalties shall be doubled if the prohibited acts are carried out with a minor of sixteen to twenty-one years of age.¹⁰ For the offence to be consummated,

the LGBT community. See the group’s website at: <https://www.astraeafoundation.org/stories/humanity-first-cameroon/> (Accessed on 12 May, 2019).

⁸ UDHR includes right of every person to life, privacy, health and equality before the law, the right to freedom of expression and freedom from discrimination and violence, including torture. In countries like Cameroon where homosexuality is criminalized, LGBT persons fear or face imprisonment and persecution solely because of their sexual orientation, gender identity or gender expression. It has been extensively documented that homophobic laws infringe on individual human rights of LGBT. See, Erica Nordberg, *Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon*, 27(2) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 440, (2012); and ATOH WALTER TCHEMI, *supra* note 4, at 80.

⁹ The CFA franc is the name of two currencies, the West African CFA franc, used in 8 West African countries, and the Central African CFA franc, used in 6 Central African countries including Cameroon. The exchange rate to the Euro is approximately 655 CFA francs to 1 Euro.

¹⁰ Section 347(1) of the penal code.

there must be an act of sexual relations between persons of the same sex. “Sexual relations”, based on the practical enforcement of the law, refers to physical sexual activity including touching, fondling, kissing, and even sexual intercourse. In reality, people are arrested and charged for homosexuality without proof of engaging in sexual relations. Behaving and dressing in a so-called ‘feminine’ manner, consuming feminine drinks (like baileys), and sending affectionate text messages to a person of the same sex are sufficient grounds to be charged.¹¹ Sometimes, in the absence of direct evidence of sexual relations, people are charged and convicted under section 94(1) & (2) of the penal code for attempted homosexuality. Section 347 *bis* is said to be homophobic as not only same-sex intercourse is criminalized, but also homosexuality as an orientation which includes a psychological state.¹² LGBT are prosecuted under section 347 *bis*. Generally, whoever engages in same-sex relations, even in the presence of a subsisting heterosexual relationship, infringes section 347 *bis*. In fact, prosecutions have been common against gays than lesbians.¹³

According to Human Rights Watch, Cameroon has the unenviable record, amongst countries still penalizing homosexuality, as being one of the most aggressive in terms of prosecutions for consensual same-sex relations.¹⁴ Out of the 76 countries in the world that prosecute people for same-sex relations, the rate of enforcement of the law in Cameroon is amongst the highest.¹⁵ The report avers that the law has been subjected to abuse by the police and others as it is used for extortion and to settle scores.¹⁶ It further states that alleged homosexuals lack legal representation and are usually subjected to torture and other degrading forms of treatment to extract confessions.¹⁷ The pathetic story of Roger Mbede, a gay man who became a global face of the fight for gay rights in Cameroon, reveals the plight of sexual minorities in the country. He was arrested, tried and imprisoned on the basis of text message alleging his sexual preference for men. His imprisonment was also confirmed on appeal. He encountered discrimination, threats and persecution even from his own family who allegedly failed to provide him with medical care until his death.¹⁸

The anti-homosexuality law has exposed LGBT to persecution. They are regularly harassed by the police often with the support of the population that is mostly homophobic and intolerant towards them. The stigmatization is extended to their families who are also subjected to ridicule.

¹¹ Neela Ghoshal, Human Rights Watch, *Guilty by Association: Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law* (21 March 2013), available at <https://www.hrw.org/report/2013/03/21/guilty-association/human-rights-violations-enforcement-cameroots-anti> (Accessed on 7th of November, 2018).

¹² Sydoine Claire T. Matsinkou & Juakom J. Emmanuel, *Homosexuality as a Crime in Cameroon*, 3(2) INTERNATIONAL JOURNAL OF GENDER & WOMEN’S STUDIES 138, 141 (2015).

¹³ Human Rights Watch reports that most of those who have been arrested and charged for the offense of homosexuality are men. *Supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Robbie Corey-Boulet, Aljazeera America, *Who Killed Roger Mbede?* (26 March 2015), available at <http://america.aljazeera.com/articles/2015/3/26/who-killed-roger-mbede-gay-rights-cameroon.html> (Accessed on 12th of December, 2018).

Homosexuality is associated with witchcraft, cultism, and family curse and injures the reputation both of the individual and his family. To shield themselves from blame and shame, family members often report other members suspected of committing the offence to the authorities. Offenders are regarded as social deviants and outcasts. Arguably, the anti-homosexuality law may be said to deny the humanity of homosexuals and, by implication, attempts to alter it. It is at the backdrop of these developments that Cameroon has been criticized for its treatment of sexual minorities. Irrespective of the merits of the criticism, at least from a liberal human rights perspective, Cameroon's attitude towards homosexuality can still be justified on the basis of human rights.

III. THE CAMEROON CONSTITUTION: A RIGHTS-BASED PROJECT

Cameroonian law guarantees the protection of numerous human rights most of which are recognized in the Constitution.¹⁹ The 1996 Constitution makes numerous references to human rights which are recognized as fundamental values. By virtue of the Preamble of the Constitution:

we, the people of Cameroon, declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights; affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples' Rights and all duly ratified International Conventions relating thereto, in particular, to the following principles: all persons shall have equal rights and obligations...; the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law.

The Preamble further guarantees freedom of expression and recognizes the responsibility of the state to "protect and promote the family which is the natural foundation of human society."²⁰ Article 1(2) of the Constitution authoritatively mandates the state to "recognize and protect traditional values that conform to democratic principles, human rights and the law" and to "ensure the equality of all citizens before the law."

Furthermore, Article 45 of the Constitution reiterates the importance that the state attaches to human rights. Based on this provision, "duly approved or ratified treaties and international agreements shall, following their publication, override national laws..." The provision incorporates ratified international treaties, including human rights treaties, into the body of municipal law. Perhaps due to the importance accorded to them, the Preamble expressly mentions three instruments: the Universal Declaration of Human Rights 1948, the United Nations Charter 1948, and the African Charter on Human and Peoples' Rights (ACHPR) 1981. In addition to these instruments, Cameroon is also a signatory to the International Covenant on Civil and Political Rights (ICCPR) 1966, and the International Covenant on Economic, Social

¹⁹ There have been 3 major constitutional developments in Cameroon. Upon re-unification of *La Republique du Cameroun* and British-administered Cameroon, a Federal Constitution came in 1961. Following a referendum in 1972, the Federal Constitution was replaced by a Unitary Constitution, which was in turn amended in 1996.

²⁰ The rights recognized in the Preamble to the Constitution are justiciable on the basis of Article 65 of the Constitution which states "the Preamble shall be part and parcel of this Constitution".

and Cultural Rights (ICESCR),²¹ etc. Following their ratification, the principles enshrined in these conventions have become part of Cameroonian law and ranked higher than the provisions of municipal law in conflict with them.

The ratified conventions put Cameroon under an obligation to protect and promote the rights and freedoms enshrined therein. By virtue of the conventions, read alongside the Constitution, a multiplicity of rights and freedoms are available to Cameroonians including equality and non-discrimination,²² freedom of expression,²³ the right to participate in the cultural life of the nation,²⁴ the duty to protect the family²⁵ and duties owed by citizens to the society and the state.²⁶ The rights enumerated above are mostly of individual and collective in nature and are associated with the offence of homosexuality. Moreover, these rights recognized in the Constitution are not arranged in a hierarchy and there is no coherent pattern for their realization or enjoyment. Therefore, the inference would be that the rights are equal in status and importance, and the offence of homosexuality is at the crossroads of these rights.

The rights protected in the Constitution are varied and punishing homosexuality deals with competing categories of rights: while the offense violates individual rights, it protects group rights. The conventional position, based on Western liberal thinking, opines that homophobic laws infringe on individual rights and freedoms notably equality and non-discrimination, and freedom of expression.²⁷ This position, which is not without merits, has been extensively documented and does not fall within the purview of this article. A different narrative can be advanced which argues that section 347 *bis* of the penal code, inasmuch as it violates individual rights and freedoms, also strengthens positive cultural values: it protects the family, upholds cultural and moral values, and reinforces the notion of duties. These alternative values are presented not as complementary. They are rather presented as divergent and competing claims. In the following, I will establish the legal bases of these claims.

The protection of the family is guaranteed under the Preamble of the Constitution and in several conventions. Article 10(1) of ICESCR is forceful in its protection of the family. It states that “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society...” In almost similar terms, Article 23(1) of ICCPR²⁸ and Article 18(1)²⁹ & (2)³⁰ of the ACHPR also protect the family. This protection

²¹ Cameroon acceded to the ICCPR and ICESCR on 27 June 1984.

²² See UDHR, Art. 7, ICCPR, Art. 26, and ACHPR, Art. 19.

²³ See UDHR, Art. 19, and ICCPR, Art. 19(2).

²⁴ See ICESCR, Art. 15(1)(a), UDHR, Art. 27, ACHPR, Art. 17(2). Article 17(3) of the ACHPR affords protection to the moral and cultural values of a community.

²⁵ See ICESCR, Art. 10(1), ACHPR, Art. 18(1) & (2), and ICCPR, Art. 23(1).

²⁶ UDHR, Art. 29 and ACHPR, Arts 27(1) and 29.

²⁷ ERICA NORDBERG, *supra* note 8, ATOH WALTER TCHEMI, *supra* note 4, at 80.

²⁸ “The family is the natural and fundamental group unit of society and it is entitled to protection by the society and the state”.

²⁹ “The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral”.

recognizes the right to marry, freedom of thought, conscience, and religion of members of the family, respect of family life and non-discriminatory treatment between spouses in relation to marriage and divorce.³¹ This protection enhances the contribution of the family to the realization of the right to an adequate standard of living for its members and achieving sustainable development. The protection also extends to family values.

Moreover, Article 15(1) (a) of the ICESCR guarantees the right of individuals to participate in the cultural life of the society.³² Article 17(3) of the ACHPR further guarantees “the promotion and protection of morals and traditional values recognized by the community...” This right recognizes the freedom not to suffer from any interference in the access and participation to cultural life. It involves both negative and positive actions from the State: non-interference with the exercise of cultural practices and with access to cultural goods and services on the one hand and ensuring preconditions for participation, facilitation and promotion of cultural life on the other.³³ Traditionally, this right was confined to education, access to artistic events, and protection of the rights of authors in the form of individual rights.

Participation in cultural life of the community refers not only to the individual dimension of the rights, but also to the possible enjoyment of those rights in community with other members of their group.³⁴ This right encompasses that the educational programs of States should respect the cultural specificities of national or ethnic, religious or linguistic minorities as well as indigenous peoples and incorporates in those programs their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. The enjoyment of this freedom encompasses a respect for culture which is interpreted in the broadest possible terms to include ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sports and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts. It also includes customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their worldview representing their encounter with the external forces affecting their lives.³⁵ This right precludes the observance of cultural practices that may impede the respect of other rights.

³⁰ “The State shall have the duty to assist the family which is the custodian of moral and traditional values recognized by the community...”

³¹ Office of the High Commission for Human Rights, 1990. CCPR General Comment No: 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses’ (1990), available at <http://www.refworld.org/pdfid/45139bd74.pdf> (Accessed on 4 November 2018).

³² This is also the case with Article 27 of the UDHR and Article 17(2) of the ACHPR.

³³ See UN Committee on Economic, Social and Cultural Rights, 2009. General Comment No. 21, Right to Take Part in Cultural Life (Art. 15, para 1a of the Covenant of Economic, Social and Cultural Rights) 21 December 2009, available at <http://www.refworld.org/docid/4ed35bae2.html> (Accessed 4 November 2018), Celine Romainville, *Defining the right to participate in cultural life as a human right*, 33(4) NETHERLANDS QUARTERLY OF HUMAN RIGHTS 405, 408 (2015).

³⁴ Marco Odello. *The Right to take part to Cultural Life: General Comment No. 21 of the United Nations Committee on Economic, Social and Cultural Rights*, 27 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 493, 498 (2011).

³⁵ UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 31.

Duties are also recognized under human rights instruments and this is most apparent in the ACHPR. According to Article 27(1) of the ACHPR, “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.” Article 29 lists out the duties owed by an individual to his community including “to preserve and strengthen positive African cultural values in relations with other members of the society...” Attributing rights to individuals with correlative duties is ingrained in the African worldview where the individual is placed at the centre of his community and acts in their interests. The individual is thus a moral being endowed with rights, but also bounded by duties, proactively uniting his needs with the needs of others. This conception was the basis of the formulation of rights in pre-colonial societies.³⁶ The notion of duties negates the individualization of rights and puts the role of the individual to promoting the collective interests.

The rights and duties elaborated above are interrelated, group-oriented, and are different from those traditionally associated with the criminalization of same-sex relations. Most of these rights and freedoms reinforce traditional values of individual responsibility, group solidarity and identity and emphasize the contribution of the individual towards his society. I shall explain the relationships these rights foster with homosexuality.

IV. ALTERNATIVE REFLECTION ON ANTI-HOMOSEXUALITY LAW: ENFORCING GROUP-ORIENTED RIGHTS

Although the Constitution and other laws emphasize individual rights, the reality on the ground suggests strong preferences for communal values. These values, amongst others, are reflected in the protection of the family alongside duties owed toward it and in respect for moral values. I shall treat them in turn.

The conception of family in Cameroon is different from that in the West. The Cameroonian family is extended. Beside the immediate nuclear family, members of the family include half brothers and sisters, cousins, aunts, uncles, nephews, and nieces. As part of the unit, extended members play an active role in the running of the whole family and in the socialization process. In the extended family, members cater for the wellbeing of one another and it is not unusual for children to regard their cousins, nephews, and nieces as brothers and sisters. Similarly, children may live with, and be brought up by, their uncles and aunts where, in principle, they are considered and treated as biological children of the household. The support system ensures that, in the death of their parents, orphaned children are cared for by surviving members of the extended family especially uncles and aunts. This support system reflects group solidarity at its best and elevates family interests above private considerations. The protection of the family, guaranteed under human rights, entails respect for this communal value that projects the family

³⁶ Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VIRGINIA JOURNAL OF INTERNATIONAL LAW 339, 359-364 (1995).

as a unit. Homosexuality, as will subsequently be documented, threatens family values and exposes the family to ridicule thereby undermining its protection.

The traditional notion of family consists of the husband, his wife or wives, their children and extended relations. Like the extended family, the Cameroonian nuclear family is large by every account. The belief in large families is in part influenced by polygamy, a practice that allows men to marry more than one wife.³⁷ Polygamy is prevalent in rural communities and increases the prospects of large families with several half brothers and sisters living together. Ensuring discipline amongst the children and cooperation between competing wives sharing the same husband is a difficult task indeed and requires instilling in them communitarian values capable of fusing diverse interests for the common good. Poverty and illiteracy are blamed for the belief in large families. The assumption is that extended and large families provide safety net to their members: in the event that a member becomes successful, he or she will, in the spirit of communality, be morally obliged to assist less successful members including parents. This gesture further promotes solidarity and unity of purpose and undermines individual preferences. Homosexual relations, including marriages, are not only inconsistent with the traditional notion of marriage, which is equated only with heterosexual relations, but also undermines the intrinsic love for children in Cameroonian society. In conformity with the traditional notion of marriage, section 52(3) of the Civil Status Registration Ordinance outlaws homosexual marriages.³⁸

Like elsewhere, children are considered the basis of marriage and the foundation of society. In addition to acting in the future as safety net to less successful members of the family, children are key determinants of a stable marriage and in their absence the survival of the marriage is often on the line. Thus, in addition to marriage pressures, couples experiencing fertility issues and childlessness are often stigmatized by society. Since procreation is an essential feature of marriage, in the absence of children, a marriage is almost always doomed to fail. Here, reference to children is to biological children as adopting children would not preclude a Cameroonian family from stigmatization. Consequently, it is not unusual for an infertile wife to permit the husband to engage in adulterous relationships in order to father a child to save her marriage. Similarly, it is not uncommon for a wife to be either chased out of the matrimonial home or replaced by another woman because of her inability to bear children for the husband.

Because of the importance of children to marriage and its stability, sexual intercourse that is not predicated on procreation is devoid of social utility in spite of the altruistic benefit of pleasure. It does not guarantee continuity of communal life as it is premised on considerations other than procreation. Homosexuality is an anathema, inconsistent with the goals of marriage, and expresses a breakdown of social values. The acts, if encouraged to develop into uncontested cultural norms, will threaten the very survival of the communitarian society. Adoption of children, an option available to homosexual couples in some jurisdictions,³⁹ is available only to

³⁷ Polygamy is recognized under section 49 of the Civil Status Registration Ordinance 1981, (Law no. 81-002 of 29 June, 1981).

³⁸ It provides: "No marriage may be celebrated: if the spouses to-be are of the same sex."

³⁹ Historically, the first country to approve same-gender adoption without restrictions was Canada in 1999. This was followed by the Netherlands (2001), South Africa (2002) and Sweden (2002). Most recently, the French

heterosexual couples in Cameroon because of the inability to naturally perform a marital obligation which, in itself, cannot be substituted for biological children. Further, adopting children outside the extended family distorts the family bloodline which is regarded as the basis of family relationships, and inheritance, in Cameroon.

The family is, therefore, at the core of social organization in Cameroon. Although it consists of individual members, the collective interest of the unit is elevated above that of its members and the role of each member is to ensure the realization of the collective wellbeing. As an institution, the family defines and projects the image of its members. Thus, in traditional societies, the worth of a person is measured not only on the basis of personal achievements but also on the integrity and moral compose of his family. In this context, in negotiating inter-family relations such as marriage, an important criterion often used to either approve or disapprove of the union is the reputation of the other family. Irrespective of his positive attributes, the family of the bride to-be is unlikely to approve the marriage if the bridegroom to-be originates from a family with questionable reputation. A person's values are said to be molded by those of his family and the family's reputation inevitably affects the perception of its members. The fear is that, on marriage, negative values inherited from the family are liable to be transferred to the offsprings of the union.

Moreover, marriage is perceived not only as a union between two individuals, but also that of two families. Family reputation is protected through traditional values including proper upbringing of children, respect for elders, moral rectitude, and upholding social conducts that strengthen community cohesion. Homosexuality is inconsistent with the protection of the family and violates the traditional concept of marriage thereby exposing the entire family, including the individual, to shame and disrepute. Obviously, homosexuality undermines communitarian values as it elevates individual choices above all others, including the superior interests of the family. Thus, the consequences of homosexuality extend beyond the individual and affect the reputation of the entire family which is prejudicial to inter-family relations.⁴⁰ Consequently, homosexuality is vehemently opposed to the extent that family members have assumed the responsibility of uprooting it within the unit by reporting suspected cases to the authorities.⁴¹

government approved same-gender marriage and adoption despite France's long religious tradition of opposition to this policy. See Darrel Montero, *Attitudes toward same-gender adoption and parenting: An Analysis of Surveys from 16 Countries*, 15(2) *ADVANCES IN SOCIAL WORK* 444, 445 (2014).

⁴⁰ In her examination of Uganda, Lydia Boyd asserts that homosexuality is seen as a problem that exceeds the individual. It brings shame to one's family and the practice is viewed as undermining other social relationships and obligations. See Lydia Boyd, *The Problem with Freedom: Homosexuality and Human Rights*, 86(3) *ANTHROPOLOGICAL QUARTERLY* 697, 711 (2013).

⁴¹ It is on record that some of the arrests made against suspected homosexuals have been orchestrated by complaints filed by family members of the accused including parents against children and sibling against sibling. It has also been reported that suspected homosexuals in custody are often abandoned by their families and even, on occasions, are ill treated by them, perhaps due to the stigma the accusations will have on the family. See Andy Copsa, *The Nation*, Abandoned and Imprisoned for being gay in Cameroon, (March 4, 2014), available at: <https://www.thenation.com/article/abandoned-and-imprisoned-being-gay-cameroon/> (Accessed on 3 of May 2019).

On top of the above, homosexuality could amount to violation of legal duties imposed on individuals. Among the duties listed under Article 29 of the ACHPR are duties to respect one's parents and work for the harmonious development of the family, to preserve social and national solidarity, to preserve and strengthen positive African cultural values and to promote the moral wellbeing of society. Preserving the moral wellbeing of society is the responsibility of each individual and requires a display of moral rectitude and integrity. The practice of homosexuality infringes these goals and is detrimental to the common good. It is not only contrary to traditional African spirituality, but it is also morally abhorrent and inconsistent with the natural orderings of life. It is also said to be inconsistent with both Christian and Islamic values.⁴² In a society plagued with insurmountable problems, including poverty, the harmonious development of the family is best achieved through cooperation between members and maintaining moral integrity.

Homosexuality is a negation of those duties and a threat to the health of society. Bernard Matolino justifies the rejection of homosexuality on African communitarian values.⁴³ He argues that the activities of an individual are constrained by the objectives of the community and this extends to issues of sexuality and sexual morality.⁴⁴ An individual should engage in responsible social and sexual behavior that seeks to construct and build her community in ways that promote the survival of the community as well as maintaining its harmony.⁴⁵ He opines that a homosexual fails the ultimate communitarian society test in that he or she fails to display a characteristic that seeks to contribute to the social good.⁴⁶

The protection of positive African values is also provided under Article 29 of the ACHPR. 'Positive African values' are those that assert African civilization and identity and promote African consciousness. Those values exclude conducts and practices that forestall the progress of the individual, the family, and society in general. One of the most positive African contributions to the global culture is the communitarian principle.⁴⁷ Communal tendencies are at the centre of

⁴² Peter Geschiere, *Homosexuality in Cameroon: Identity and Persecution*, in *URGENCY REQUIRED: GAY AND LESBIAN RIGHTS ARE HUMAN RIGHTS* 126-131 (I. Dubei & Hieikema A., eds., Humanist Institute for Cooperation with Developing Countries: The Hague, 2010). It is also understood in popular and political discourses in Zambia that homosexuality is incompatible with Christianity. See Adriaan Van Klinken, *Homosexuality, Politics and Pentecostal Nationalism in Zambia*, 20(3) *STUDIES IN WORLD CHRISTIANITY* 259, 265 (2014).

⁴³ Bernard Matolino, *Being Gay and African: A View from an African Philosopher*, 18 *UNISA PRESS JOURNALS* 59, 70 (2017).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ In addition to its articulation above, the principle is also expressed in collective ownership of property, participation of the entire community in the settlement of disputes and in upholding duties to the community. Despite the abrogation of customary tenure in Cameroon by Law no. 74-1 of 6 July 1974 regulating land tenure, most lands, is still basically held under this system. Customary tenure provides for collective ownership or the holding of land individually, but for collective interests. Land is usually held by the chief or the Council of Elders for the benefit of the entire community. Land is attributed based on the size and needs of individuals or families and reverts back to the society if the beneficiary abandons the said parcel of land. Through collective ownership, the wellbeing of the community is placed above the interests of the individual. Community is also expressed in the collective settlement of disputes, which require the participation of community elders and all those who either know the parties or are familiar with the history of the problem. It is a platform where everyone is expected to speak. See Tom Tso, *The process of decision making in tribal courts*, in *LAW AND ANTHROPOLOGY* 435-447 (P. Sack & J.

social life and are associated with moral responsibilities and duties which each individual is expected to project for the betterment of society. Expressions of communality do not entail complete negation of individual claims. Rather, individual claims are recognized in so far as they strengthen communal interests. Rather than furthering communal interests, homosexuality subverts the standing of the family and threatens its unity as it often leads to recriminations amongst family members.

Based on the analyses above, homosexuality is not amongst the “positive African values” to be protected under Article 29 of the ACHPR nor is it an uncontested feature of cultural life in Cameroon. Arguments have been advanced to suggest that homosexuality was ingrained in African societies, and existed prior to colonialism and, thus, the colonizers enacted homophobic laws to combat the phenomenon in the colonies.⁴⁸ Those views cannot be validated in Cameroon. Probably, isolated incidences of homosexuality existed, and perhaps still do, in Cameroonian society. However, they represented deviations from communal patterns rather than the general norm. Contrarily, in large parts of the south of the country, Peter Geschiere reports that homosexuality was seen as an abomination and was associated with witchcraft, which places same-sex sexuality outside the order.⁴⁹ Hence, he assumes that the practice was present but in very secretive form, whereas in the north of the country, there was a sharp formal condemnation as conflicting the Koran.⁵⁰ The secrecy shrouded in the isolated incidences of the practice should not be attributed to its criminalization. Rather, it should be seen as recognition of its abhorrence; thus, for someone to maintain his position and reputation in society, he must not be associated with the anti-social practice of homosexuality. To maintain their standing, the acts had to be

Aleck eds, Dartmouth Publishing Company Ltd, 1992). There is no belief in *locus standi* as the basis for participation in the litigation as is the situation in Western-style courts.

⁴⁸ See, amongst others, Busangokwakhe Dlamini, *Homosexuality in the African Context*, 20(67) AGENDA 128-136, 129 (2006); Deborah P. Amory, “*Homosexuality*” in *Africa: Issues and Debate*, 25(1) A JOURNAL OF OPINION 5, 5 (1997); Josiah Taru & Hardlife S. Basure, *Rethinking the Illegality of Homosexuality in Zimbabwe: A Riposte to Chemhuru*, 5(1) INTERNATIONAL JOURNAL OF POLITICS AND GOOD GOVERNANCE 1, (2014); Gomes G. Da Costa Santos, *Decriminalizing Homosexuality in Africa: Lessons from the South African Experience in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLE FOR DECRIMINALIZATION AND CHANGE* 313, 333 (C. Lennox & M. Waites, eds., School of Advanced Study, London, 2013); and Nicholas Alden Kahn-Fogel, *Western Universalism and African Homosexualities*, 15 OREGON REVIEW OF INTERNATIONAL LAW 315, 326 (2013)

⁴⁹ PETER GESCHIERE, *supra* note 42.

⁵⁰ *Id.* at 128-129. The Koran is very explicit in its condemnation of homosexuality. In the Qur’an homosexuals are referred to as qaum Lut (Lot’s people), referring to the prophet Lut (known as Lot in the Christian Bible) who preached against homosexuality in the cities of Sodom and Gomorra, which were subsequently destroyed. In the Qur’an Luts questions, “How can you lust for males, of all creatures in the World, and leave those whom God has created for you as your mates? You are really going beyond all limits.” The prophet Muhammad adds, “Doomed by God is who does what Lot’s people did [i.e., homosexuality]”. The prophet also commented that, “No one should look at the private parts of another man, and no woman should look at the private parts of another woman, and no two men sleep under one cover and no two women sleep under one cover”. In his last speech, known as the “Farewell Sermon”, the prophet added a last condemnation of homosexuality saying: “Whoever has intercourse with a woman and penetrates her rectum, or with a man, or with a boy, will appear on the Last Day stinking worse than a corpse; people will find him unbearable until he enters hell fire, and God will cancel all his good deeds.” See Khalid, Duran, *Homosexuality in Islam in HOMOSEXUALITY AND WORLD RELIGIONS* 181, 182, 183, 184 (Swindler, Arlene, ed., Valley Forge, Pennsylvania, 1993).

performed in secrecy. In this connection, those guilty of same-sex relations were deviants who acted contrary to the spirit of moral rectitude rather than in conformity with it.

The suggestion that European colonizers met homosexuality in much of Africa and enacted homophobic laws to combat it is also not sustainable in Cameroon. It is true that most of the laws still in force in Cameroon are of colonial heritage and, arguably, the law on homosexuality is not an exception. The colonial states, France and Britain, merely transposed into their respective colonial territories laws that were tailored to their respective realities. In the foregoing, the Penal Code 1967 is more of a reflection of the French Penal Code and the Nigerian Criminal Code (itself based on the English draft of 1879) that were extended into the various territories and the provision on homosexuality was thus premised not on the social reality of Cameroon, but that of the colonial authorities.⁵¹ Evidently, it seems that Cameroonian authorities believe that same-sex relations is a foreign concept that has no place in Cameroonian culture and society and the objective of section 347 *bis* of the penal code is therefore to ensure that it does not gain roots.

The rights and duties analyzed above are as relevant as those traditionally associated with homosexuality considering that human rights are universal, inalienable, indivisible, interdependent, and interrelated and none can be fully enjoyed without the realization of others. Since the Constitution does not provide a hierarchy of rights nor establish a consistent pattern for their realization, by punishing homosexuality, the authorities in Cameroon have deliberately or inadvertently elevated group rights of the community above individual rights of homosexuals, inevitably leading to rights prioritization. This is unsurprising development given the important roles played by traditional values in the country.

By prioritizing in favour of communal values, the state has infringed on the individual rights of LGBT through the criminalization of homosexuality. A violation of one category of rights to enforce another is, at best, an uncomfortable and provocative compromise. The trend towards rights prioritization is not an isolated occurrence and is mostly evident in group-oriented cultures, especially when individual and communitarian claims compete with each other. Though no general pattern has emerged in Cameroon, rights prioritization has featured in case law, notably in *Ako Vincent Bissong v. Endeley Emmanuel*⁵² where the Court of First Instance, Limbe, prioritized cultural claims over individual claims. The claimant's action against the defendant was in the sum of 250.000 francs CFA being for general damages for conversion, loss of

⁵¹ The penal code 1967 harmonized disparate criminal laws applicable in the former West and East Cameroons. It was inspired by the ill-fated French draft of 1934, which has no more become law than the 1879 draft in England. Indeed, the influence directly came from the Nigerian Criminal Code which was based closely on the English draft of 1879 which also inspired the Canadian and Queensland codes. In addition to these foreign laws, the Italian Penal Code 1931 was also of great influence. See. Clarence, J.A. Smith, *The Cameroon Penal Code: Practical Comparative Law*, 17(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 651, 651-52 (1968).

Although homosexuality was decriminalized in France after the French Revolution, it was only decriminalized in England in 1967. The Italian Criminal Code 1931 outlawed homosexual acts amongst gay men who were persecuted under a law prohibiting acts 'corrupting the morals.' Although most European countries have changed their attitudes and legal positions toward same-sex relations, the Cameroon Penal code adopted a homophobic stance. Arguably, this was because most of the foreign codes that inspired the Cameroon code were, by then, intolerant towards homosexuals and homophobic.

⁵² Court of First Instance Limbe, suit no. LM/83/99: unreported (1999).

business, and for the recovery of his canoe. The claimant's canoe was seized by local traditional authorities, in coordination with the defendant, for his violation of a custom prohibiting the setting of fire on an island used by the village communities to perform rituals. His failure to secure the release of his canoe with the assistance of the local administrative authorities and a human rights group prompted this action. The Court ruled against the claimant on the ground that his action was misdirected against the wrong defendant (which should have been the traditional authorities that ordered the seizure of the canoe). Nonetheless, the court pointed out that even if the action had been brought against the correct defendants, the outcome could not have been any different for "a [customary] rule forbidding a particular act or acts from being done at a shrine or place of sacrifice is not repugnant to natural justice." The court ordered the claimant to write a letter of apology to the traditional authorities and, thereafter, go to the village to retrieve his canoe.

Although the court did not employ the language of rights, the saliency of human rights issues is evident from the facts. Apparently, the case is at the centre of divergent and competing rights: the claimant's right to freedom of expression, as evidenced by his desire to set a fire on the island to warm himself, and his right to quiet enjoyment of property without undue interference;⁵³ and the right of the traditional communities to live according to their customary values. These rights are competing before the court: recognizing the claimant's right to set fire on the Island or to enjoy his property without undue interference would violate the local communities' right to preserve their indigenous belief which is to prohibit persons from setting fire on certain areas of the Island. Intimating that the claimant will not succeed in his action even against the correct defendants indicates the prioritization of the communities' rights against those of the individual.⁵⁴

Prioritization of rights is not restricted to jurisdictions in sub-Saharan Africa. Heather Montgomery documents this phenomenon through the eyes of children involved in prostitution in the village of Baan Nua, Thailand.⁵⁵ Using the Convention on the Rights of the Child, she reveals the conflict involved in implementing certain provisions of the Convention, particularly the protection from sexual exploitation under Article 34, freedom of expression, freedom of

⁵³ This right is provided, amongst others, under article 17(1) of the UDHR which states: "Everyone has the right to own property alone as well as in association with others. Subsection (2) is to the effect that "No one shall be arbitrarily deprived of his property".

⁵⁴ Notwithstanding that the verdict was in favour of the defendant, it reveals an attempt by the court to balance both rights. Firstly, it rejected the claimant's action as misdirected and cautioned that a substitution of the defendants would not change the outcome of the case. Secondly, it intimated that upon writing a letter of apology, the claimant would be able to retrieve his canoe. Therefore, irrespective of the collapse of his claim, he was still entitled to his canoe. The balancing act of the judgment is intriguing. It suggests that although the claimant's action is genuine, the defense of custom advanced by the defendant is also compelling. The defendant is not liable in damages and the claimant is still entitled to retrieve his canoe. Implicitly, the court stated that both parties were right in their actions in one form or another although, in the circumstances of the case, more consideration had to be given to group rights as against individual rights. Thus, in its desire to balance both rights, it gave priority to one as against the other.

⁵⁵ Heather Montgomery, *Imposing rights? A case of child prostitution in Thailand*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* 80-101 (J.K. Cowan, M.-B. Dembour & R. A. Wilson, eds., Cambridge University Press, Cambridge, 2001).

thought and conscience under Articles 13 and 14 respectively. She intimates that human rights activists are inclined toward the protection of the right stipulated under Article 34 whereas the children are more interested in safeguarding those provided under Articles 13 and 14, which in essence, repudiate the exercise of the right provided under Article 34. She states that the children in exercising their rights to freedoms of expression, thought and conscience see no evil in prostitution which provides the income needed to cater for their families; they participate in prostitution to fulfill the duties owed to their family. Therefore, the children's desires to realize their cultural obligations under Articles 13 and 14 have driven them into prostitution thereby violating their freedom from sexual exploitation provided under Article 34.⁵⁶

Apparently, the criminalization of same-sex relations in Cameroon does not seem to be a deliberate attempt to abrogate the individual rights of homosexuals. Rather, it should be seen as an unavoidable consequence of rights prioritization which, unfortunately, is a regular feature of modern human rights. Prioritization repudiates freedom of expression in favour of group-oriented obligations. Evidently, the notion that homosexuals are entitled to legal protection that overrides cultural rights, family duties, and responsibilities seems inappropriate in Cameroon.

V. CONCLUSION AND RECOMMENDATION

Despite Western condemnation of section 347 *bis* of the penal code, state attitude towards homosexuality is rarely polarizing in Cameroon. Although dissenting opinions in favour of decriminalization of same-sex relations are becoming louder nowadays, and mostly promoted by human rights groups on the basis of individual rights, they are usually superseded by conservative forces, relying on the argument of culture to forestall attempts at decriminalization. Each of these antagonistic positions is sustainable and justified under Cameroonian and international laws. Thus, evidently, based on the interpretation of the applicable laws, the offence of homosexuality involves competing categories of human rights: inasmuch as it violates the individual rights of homosexuals, it also enforces group-oriented rights of the community.

Although most of the laws in force in Cameroon are still of Western liberal inspiration, communitarian values continue to play an essential role in their interpretation. Seemingly, some of these communitarian values are inconsistent with liberal ideologies which, as in the case of homosexuality, do not respond to the belief system of the people and thus create tensions. The current legal climate presents no easy option to the Cameroonian authorities. It is not an acceptable option to abrogate the individual claims of homosexuals. Similarly, it is not sustainable to ignore the cultural sensitivity of the people. To put it simply, there is a need for the state to enact laws which are not homophobic, and which equally reflect the aspirations of a greater majority of Cameroonians to ensure to the people a sense of ownership of the legal process. Achieving such an outcome in a conservative and group-oriented society as Cameroon is a tall order indeed.

In spite of the anticipated difficulties, attempts should, nonetheless, be made at protecting sexual minorities while at the same time respecting cultural sensitivity. A potential compromise,

⁵⁶ *Id.*

unlikely to be satisfactory to conservative forces, will require a limited moratorium on prosecutions of homosexuals if they are discreet about their sexual orientation and if they act in ways that do not offend public sensitivities. Such a restrictive but tolerant approach to homosexuality will allay fears against the emergence of an alternative sexual culture capable of threatening the traditional notion of marriage, and with it, the dignity and respect accorded to the family. Failure to adopt such a restrictive, but permissive approach in favour of outright decriminalization of same-sex relations in Cameroon will rarely improve social attitudes toward homosexuals and other sexual minorities.

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